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ORIGINAL

EX PARTE OR LATE FILED

July 1, 1999



Mr. William A. Kehoe III
Common Carrier Bureau
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

*Re:* *CC Docket No. 96-115/Subscriber List Information*
*CC Docket No. 96-98, Local Telephone Competition*
*Ex Parte Presentation*

Dear Bill:

As we indicated, if the Commission is going to issue a further notice on the questions of how to address non-printed providers of directory information, we urge the Commission to consider addressing the following issues.

BACKGROUND

1. In ruling on the question of who constitutes a "publisher" of directory information under Section 222(e), it came to our attention that there are at least two distinct providers of directory information in addition to those publishing printed directories: those who provide directory information via the Internet and those who do so via operator assistance.

2. In the Section 222(e) Order, we concluded that Congress intended to provide non-discriminatory and reasonable access to Subscriber Listing Information (SLI) to persons who publish printed directories. In this companion Notice, we tentatively conclude that, by mandating that publishers "in any format" be afforded such access, Congress intended to protect more than simply those publishing printed directories. See Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979) ("In construing a statute we are obliged to give effect, if possible, to every word Congress used."). In addition, we tentatively conclude that Congress did not have a specific conception of what other providers fell within Section 222(e), but left to the Commission to make an informed judgment as to how to define "publisher in any format." See Chevron v. Natural Resources Defense Council, 467 U.S. 837, 843 (1984).

3. In the Section 222(e) Order, we declined to provide non-discriminatory access to other entities that might constitute "publishers in any format" on the ground that the record in that proceeding had focused on printed publishers. We acknowledge that both Internet and oral directory assistance providers filed *ex parte* submissions, but we determined that it would be preferable to address these – and other eligible – entities through an additional proceeding. Among other reasons, we concluded that to provide some, but not all, of the "publishers in any format" with non-discriminatory access might give an arbitrary advantage to certain providers over others and would constitute a technologically-biased rule.

DIRECTORY ASSISTANCE PROVIDERS

4. The matter of directory assistance (DA) providers presented an additional reason for commencing a new proceeding: they also might be entitled to SLI pursuant to Sections 201, 202 or Section 251 of the Communications Act.

5. Section 251(c)(3) imposes on carriers "the duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title."

6. In our Local Competition Order, we determined that, under Section 251(c)(3), competitive local exchange carriers (CLECs) were entitled to access to the databases of SLI maintained by the incumbent local exchange carriers (ILECs). See In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd 15499, para. 538 (1996) (Local Competition Order). This determination rested, in large part, on the ground that access to these databases could not be obtained from alternate sources and was necessary to be an effective competitor to the ILEC.

7. Our Local Competition Order did not, however, address whether DA providers unaffiliated with CLECs would be eligible to receive access to the SLI under Section 251 (c)(3).[1] In the wake of our inaction on this issue, some States have moved ahead to provide DA providers with access to SLI on the same rates, terms, and conditions

[1] An Order of the Common Carrier Bureau in a subsequent complaint proceeding did conclude that this issue had not been addressed by the Commission and that, under existing law and regulations, such providers were not entitled to this information under Section 251(c)(3). See Infonxx, Inc. v. NYNEX, DA 98-961 (May 27, 1998). In that decision, the Common Carrier Bureau Chief explained that, under current Commission rules, INFONXX could not be considered a "provider of telephone exchange service nor

provided to CLECs. See Transition to Competition in the Local Exchange Market, Case 94-C-0095, 187 P.U.R.4th 345 (N.Y.P.S.C. 1998).

8. One aspect of whether directory assistance (DA) providers are eligible for access under Section 251(c)(3) turns on whether they can be deemed a "telecommunications carrier," i.e., a provider of telephone exchange service. At present, we can envision three bases for classifying DA providers as "telecommunications carriers" for purposes of Section 251 (c)(3): (1) DA providers frequently complete a call to the requested number and therefore engage in the provision of "telecommunications services"; (2) DA service is an adjunct-to-basic, see Implementation of the Non-Accounting Safeguards of Section 271 and 272, CC Docket No. 96-149, First Report and Order, 11 FCC Rcd 21905, 21958 para. 107 (1996), and thus should be treated as a "telecommunications service"; and (3) if a competitive DA provider is a designated agent of a telecommunications carrier then the DA provider stands in the shoes of a telecommunications carrier and is entitled to Section 251 elements to the same extent and on the same rates, terms and conditions as a carrier.

9. Whether or not Section 251(c)(3) authorizes the Commission to require access to SLI for DA providers, the Commission also enjoys wide authority to take such actions under Sections 201and 202 of the Act. Section 201(b) states that "[t]he Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act." Historically, the Commission has enjoyed considerable discretion under this provision in determining what regulations are in the public interest. See United States v. Southwestern Cable Co., 392 U.S. 157 (1968). Section 202 makes unlawful discriminatory practices by any common carrier. The Commission has relied on this provision to prohibit discriminatory practices by common carriers in a number of areas. In the Second Report & Order of the *Local Competition* proceeding, for instance, the Commission relied on this provision to extend to paging companies, which are not otherwise eligible under Section 251(b)(3), protections against discriminatory numbering practices by incumbent carriers. Second Report & Order at para. 333. Accordingly, we tentatively conclude that Section 202 would authorize a similar directive as to DA providers – i.e., that they can take advantage of the right to access SLI conferred to telecommunications carriers under Section 251 of the Act.

10. If the Commission were to mandate that ILECs provide SLI to DA providers under Sections 201, 202 or 251, we tentatively conclude that such access should be at the same rates, terms, and conditions as ILECs provide access to CLECs under Section 251. These rates would be nondiscriminatory and thus consistent with Section 202. Such an approach also would have the salutary benefit of ensuring that DA providers and their CLEC (and ILEC) counterparts competed on a level playing field, i.e., one that did not confer advantages to different entities offering an identical service. In addition, we

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a provider of telephone toll service as defined by the Act" and thus a formal complaint proceeding was not the proper forum to seek such protections. Id. at 7.

recognize that providing access to SLI to DA providers under Section 251's requirements (whether authorized by Sections 251 or 201, 202) would facilitate the development of "carriers' carriers" for Directory Assistance and would thus eventually obviate the need to mandate that ILECs provide such services on an "unbundled basis."

11. Finally, we tentatively conclude that a mandate that DA providers receive SLI access at the same rates, terms, and conditions as their CLECs counterparts (however so justified) should be enforced at both the state and federal level. That is, DA providers would, if unable to reach a voluntary agreement with an ILEC, have the option of (1) asking a state commission to arbitrate an "interconnection agreement" that would provide the terms of access to SLI or (2) filing a complaint with the FCC under Section 208 of the Act to request enforcement of the right to SLI at the same rates, terms, and conditions that such information is provided to CLECs under Section 251. A complaint filed under Section 208 would be, if otherwise suitable, eligible for our expedited ("rocket docket") consideration.

QUESTIONS FOR COMMENT

12. What entities other than publishers of printed directories constitute "publishers in any format" for purpose of Section 222(e)?
13. Should publishers eligible for SLI under Section 222(e) be afforded SLI access at a single benchmark rate or does nondiscriminatory access require that publishers be afforded access at the same rates, terms, and conditions as provided to similarly situated providers? Should, for example, DA providers -- assuming that they fall within Section 222(e)'s mandate -- be afforded the same rates as that afforded to CLECs providing an identical service?
14. Should DA providers be afforded access to SLI under Section 251(c)(3) or Sections 201 and 202 of the Act?
15. If DA providers are granted access to SLI under Section 251 or Sections 201 and 202, should they be granted the right to such information at the same rates, terms, and conditions as such information is conveyed to CLECs under Section 251?
16. Would authorizing access to SLI under Section 222(e) be complementary to or mutually exclusive with authorizing such access under Section 251 or Sections 201 and 202?
17. If the Commission determines that additional entities, under Sections 201 and 202, 222, or 251, are entitled to such access, how should the Commission ensure that such access is actually provided?

***

We hope this information is helpful. If you have any questions, please contact the undersigned.

Sincerely,

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